

The New Normal? – Emergency Measures in Response to the Second COVID-19 Wave in Poland

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In many ways, this post will serve as a sequel to the contribution made towards the [previous “COVID-19 and States of Emergency” COVID-19 Symposium](#), indeed many of the aspects of Poland’s response to COVID-19 outbreak discussed there remain valid. Poland, just as most of CEE (Central and Eastern European) countries, emerged out of the initial outbreak of COVID-19 in Spring victorious, having prevented any major loss of life and successfully reopened most of its economy. The 2020 presidential election was ultimately held with the incumbent President Duda defeating the opposition candidate Trzaskowski. With schools reopening in September, it all seemed like Poland is a solid candidate for a poster child of successful management of the pandemic and return to normalcy.

Then the Autumn 2020 wave of pandemic arrived and Poland, just like other CEE countries in an uncanny reversal of its earlier fortunes, was hit hard. While the virus did not overwhelm the Polish health care system, the number of fatalities rose sharply, [quickly reaching a five-digits number and dispelling any hopes for a smooth transition through Autumn and Winter towards recovery](#). Poland arrived at 2021 with the health care system strained, the economy thrown into recession for the first time since 1989, and growing concerns over the government’s handling of the pandemic.

This post will cover four core areas of legal concern regarding the Polish response to COVID-19 across the last few months. First of them is the continued issue of legality of the measures used. Second is the issue of transparency and clarity of the measures employed with a particular look at the issue of exiting the emergency. Third is the matter of judicial oversight and the role of Polish courts during the pandemic. Fourth issue pertains to the convergence between the challenges brought about by the pandemic and the continued backsliding of the rule of law and erosion of human rights in Poland.

Legality of Measures

The general legal framework for the emergency measures employed in Poland remained unchanged from the Spring period. A statutory state of emergency, the “state of epidemic”, provided for in the 2008 law on the prevention and control of human infectious diseases and infections has been introduced de facto indefinitely and serves as [the legal anchor for the government’s response](#). The state of epidemic enables the government to take actions towards crisis management of the pandemic and to introduce secondary legislation which restricts human rights and freedoms.

During the period of October-December 2020, the government has issued no less than 12 resolutions containing new emergency measures or revising existing ones.

The list of such measures affecting the everyday life of people in Poland has grown exponentially. After a brief re-opening during early Summer, schools were closed completely in October, with primary and secondary education carried out entirely remotely and the youngest pupils returning to in-class education from January on. Curfews were introduced, including a ban on movement of any person before 18 years old during the day hours, and a two-day total curfew during the New Year's Eve and 1 January. Limits were placed on the number of people meeting both in public and in private. Entire branches of economy have been temporarily or continuously shut down or made practically inoperable – from restaurants to hotels, sports facilities, cinemas, and museums to swimming pools. In fact, with some of these measures amounting to complete impossibility of operating one's business, these measures go beyond 'limitations' and are in fact full derogations of economic rights and freedoms. Even if the government were to introduce a constitutional state of emergency and to enshrine these measures in a statute of a parliament, a question would remain whether effectively removing an entire sphere of one's rights protected under the Polish Constitution and ICESCR is permissible. However, with the government continuing to employ a statutory "state of epidemic" and refraining from introducing a constitutional state of emergency while at the same time using resolutions as the legal base for most of the measure, this question remains purely academic.

What is however clear, is that the use of secondary legislation to limit human rights and freedoms is directly contrary to art. 31 pt. 3 of the Polish Constitution, which requires such limitations to be introduced in a statute of the parliament. While some of the limitations, such as the mask mandate, were ultimately enshrined in the revised 2008 law, many remain regulated by resolutions of the government and lack a proper basis in a statute or the statutory legal base for them is exceedingly vague, leaving the secondary legislation to outline actual details and scope of measures – a practice that also directly violates the principles of relationship between primary statutory legislation and secondary legislation issued to complement it, as outlined in the art. 92 of the Constitution.

Transparency and Clarity of Response

While the issue of legality of the measures is specific to the situation in Poland, the overarching deficiency in communication, clarity and planning of the pandemic response is an issue Poland shares with many countries examined in this symposium. Several parallels can be drawn with the United Kingdom, as some of aspirations and failures of the government are quite similar. Initially, the Polish government hoped to rely on targeted, limited measures introduced on the level of powiat (county), the middle-sized unit of local government, and [using colour coding from green to red depending on the severity of measures](#). This framework quickly became obsolete as the virus spread rapidly through the country, leading the government to declare the entire Poland as "yellow" zone [and subsequently as "red"](#).

On 21 November, the government unveiled an array of [“steps” of severity of response](#), linking the severity of measures to the average number of daily cases. A “national quarantine”, the most severe level, was to be introduced if the average daily number of new detected cases would reach 27-29,000 over course of a week and would be lessened if the numbers went down. In principle, this policy represented a good practice and a rare example of a government setting some, however vague and imprecise, strategy for exiting the measures and lessening the restrictions. However, this policy too did not survive contact with reality for long, as on 17 December the government imposed the most severe set of measures seen insofar, while not referring to those as “national quarantine”. Despite the daily number of new cases climbing down steadily in January, no major loosening of restrictions followed, leading to a conclusion that the “tier” system was abandoned along the way. At this point, the Polish government does not present any “exit strategy” for lessening the restrictions, let alone lifting the state of epidemic.

A particular case of how the Polish government conducted its communication on the pandemic and reacted to criticisms concerns the story of Michał Rogalski, a 19-year-old high school student and self-taught computer whiz. As the number of new covid-19 cases in Poland began to skyrocket, [Rogalski began gathering data on new cases detected that were published by the powiat-level sanitary authorities](#). He quickly found out that the numbers do not add up to the totals presented by the government and set out to publish his own set of data. Rogalski’s findings were quickly picked up by the media and civil society. [The government responded by ceasing to publish the powiat-level data and instead publishing only the total for the whole country, leaving out the possibility of verifying the information](#).

The Role of the Judiciary

Courts in Poland have continued to operate throughout the second wave of the pandemic. This applies to the top courts (Supreme Court, Supreme Administrative Court and Constitutional Tribunal) and the three branches of Polish judiciary (general, military, and administrative). As far as oversight over the enforcement of the measures is concerned, the administrative courts play a critical role, as it is within their purview to review fines and punishments handed out by the sanitary authorities. A silver lining of the situation of the Polish judiciary is that administrative courts have seen the least amount of infringement on their independence insofar. These courts have been able to operate without undue influence or capture attempts, something critics attributed to the leadership of the Supreme Administrative Court staying away from challenging outright the government insofar.

As administrative courts returned to partial operation following their complete closure during Spring, they began reviewing the enforcement of COVID-19 measures. The general slowness of Polish courts means that the first decisions are being handed out at the time of writing, but already one can see a pattern of administrative courts sharing the concerns regarding the legality of measures outlined above.

For example, in a decision dated 4th Jan 2021, a Voivodship Administrative Court in Opole annulled the punishments handed out to a barber who opened his

establishment during the lockdown in April 2020. The court outlined that the total closure of an entire branch of economy on basis of a governmental decree with no constitutional state of emergency in place is illegal. As cases such as this one will make their way to the Supreme Administrative Court, it remains to be seen whether it will be ready to challenge the government and uphold the decisions of lower-level courts.

The Polish Supreme Court, which handles civil and criminal cases, is slowly turning towards deciding in covid-19 related cases. [On 16th March 2021, the Criminal Chamber of the Supreme Court ruled in case finding that fines imposed for violations of restrictions on personal movement that were introduced via governmental decrees in March 2020 were unlawful, as the legal grounds for restrictions were enshrined in secondary legislation instead of an act of the parliament.](#)

Backsliding of the Rule of Law and COVID-19

A particular feature of the situation in Poland is the unfortunate convergence between the legal doubts as the governmental response to the pandemic and the continuing backsliding of the rule of law in Poland. The earlier contribution to the previous symposium outlined the issue of dysfunctionality of the Polish Constitutional Tribunal and the practical impossibility of it fulfilling its constitutional role of judicial review. However, its dereliction of that duty is not the only major concern regarding Ms. Przybicka's Tribunal.

In September 2020, the government lodged an application with the Constitutional Tribunal, requesting it to examine an article of the Polish Civil Code which provides for liability of the government for actions that were undertaken by it based on an act of law that is contrary to the constitution, providing that the non-compliance with the constitution has been established by any court. The government seeks for the Constitutional Tribunal to find that this law must be interpreted so that a decision of the Tribunal itself would be required to open the way towards liability. In turn, that would mean that the government would be in practice shielded from any liability with the Constitutional Court in its current state likely siding with the government in every such case. Given the effective complete capture of the Constitutional Tribunal by the ruling party, it seems quite likely that in case of an uptick in civil cases against the government based on that provision of the Civil Code, a swift *deus ex machina* in form of a friendly decision by the Constitutional Tribunal will manifest itself.

The catch here is that this in turn would lead to the state being absolved for any civil liability arising from damages caused by COVID-19 emergency measures introduced in a manner contrary to the constitution, as outlined above. The government, aware that the current provisions of the civil code could enable individuals, companies, and organisations to seek compensation for losses incurred by shutdowns and limitations, is likely seeking a way to shield itself from such liability, using the captured Constitutional Tribunal as a crutch. This means that beyond failing at functioning as provider of efficient and impartial judicial review, the Constitutional Tribunal is now being legally weaponised as to be used by the government to shield itself from responsibility for its failings.

Recommendations

The first immediate recommendation would be for the Polish government to immediately introduce a constitutional state of emergency – preferably the state of natural disaster – and to entrench its legal response to the pandemic in it, subsequently introducing all emergency measures in statutes of the parliament. This alone would resolve a large chunk of legal controversy concerning the legality of the government’s action. The second step would be to review all the measures and refrain from using those that lead to a complete removal of some sphere of economic, social or cultural life. Economic, social and cultural rights are deeply entrenched in the Polish constitution and the International Covenant on Economic, Social and Cultural Rights, which Poland ratified and has been a staunch supporter of. While it is inevitable that the fight against the pandemic will lead to a recession and force limits on businesses, an outright shutdown coupled with meagre economic support for entrepreneurs and culture may have devastating long-term consequences. Third step would be a review of planning and communication towards providing the society with a clear exit plan, benchmarks for introducing or lifting measures, and strong scientific reasoning for measures taken.

The government should respect the courts – in particular, the administrative courts as they review the enforcement of measures and find legal grounds for fines and punishments incompatible with the constitution. As these cases inevitably reach the Supreme Administrative Court, it too should not shrink from its duty and prepare to meet the government head on. Above all, the destruction of the rule of law in Poland should stop and steps need to be taken towards reversing the damage done already, in particular towards the courts and the Constitutional Tribunal. Unfortunately, this recommendation is not much more than joining the choir of people calling out to the forest, which is the Polish version of “*voz del que clama en el desierto*”.

